Indian Claims Commission

Nekaneet First Nation

Report on: Agricultural and Other Benefits under Treaty 4

March 1999

102-02605/

Indian Claims Commission

Commission des revendications des Indiens

March 17, 1999

Chief and Council
Nekaneet First Nation

The Honourable Jane Stewart
Minister of Indian Affairs and Northern Development

The Honourable Anne McLellan
Minister of Justice and Attorney General of Canada

Re: Nekaneet First Nation
Agricultural and Other Benefits under Treaty 4

The Nekaneet First Nation initiated proceedings before this Commission by letter dated August 30, 1996, from Thomas J. Waller, QC, Counsel for the Nekaneet First Nation, to the Indian Claims Commission. On October 23, 1998, Warren Johnson, Assistant Deputy Minister, Claims and Indian Government, informed the parties that the Government of Canada offered to accept the Nekaneet First Nation's agricultural, ammunition, and twine benefits claim under Treaty 4 for negotiation of a settlement.

In view of this acceptance, the Commission has taken no further steps to inquire into the First Nation's claim. Our review of the history of this claim and summary of the events are contained in the attached report, which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC
Commission Co-Chair

Roger Augustine
Commissioner

CANADA

Éd. Enterprise Building, Suite 400 - 427 ouest, av. Laurier Ave. West
P.O. Box/C.P. 1750, Station/Succursale "B", Ottawa, Canada K1P 1A2
Tel (613) 943-2737 Fax (613) 943-0157

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE NEKANEET FIRST NATION

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commission Chair Roger Augustine

COUNSEL

For the Nekaneet First Nation
Thomas J. Waller, QC

For the Government of Canada
Patricia Rowe

To the Indian Claims Commission
David E. Osborn, QC / Kathleen Lickers

March 1999

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PART I

INTRODUCTION

In February 1987, the Nekaneet First Nation submitted a specific claim to the Minister of Indian Affairs and Northern Development[1] seeking compensation under Treaty 4 for outstanding provisions of agricultural benefits, programs and services, annual payments to band members, and damages for failure to provide a reserve at the time of the Treaty's signing in 1874. As of 1996, the First Nation had not received any indication from Canada whether the claim would be accepted for negotiation. On October 23, 1998, after the First Nation had entered the Commission's inquiry process, Canada offered to accept the Nekaneet's claim for negotiation of a settlement. As stated in Canada's acceptance letter, the Nekaneet claim is "the first agricultural benefits claim Canada has ever accepted under Treaty No. 4 and is the first historical claim for agricultural benefits accepted by Canada."[2]

The First Nation requested an inquiry into the claim by the Indian Claims Commission (the Commission) in August 1996.[3] Given that the Commission's mandate is to inquire into rejected claims and given that Canada had not responded to the claim, counsel for Nekaneet First Nation requested an advance determination as to whether Canada would challenge the mandate of the Commission to hear the matter.[4] A planning conference was held on November 21, 1996, at which time counsel for the Department of Indian Affairs and Northern Development (DIAND) did raise a preliminary mandate challenge.[5] The department stated that the Nekaneet First Nation claim,

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1 Thomas Waller, QC, Counsel to Nekaneet First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, August 30, 1996, attaching both a Band Council Resolution approved by Chief and Council on August 29, 1996, and a copy of the original Claim Submission to the Minister of Indian Affairs and Northern Development by the Nekaneet Band No. 160A, dated February 16, 1987 (hereinafter 1987 Nekaneet Claim Submission) (reproduced as Appendix A).

2 Warren Johnston, Assistant Deputy Minister, DIAND, to Chief Larry Oakes, Nekaneet First Nation, October 23, 1998 (Appendix B).

3 Thomas Waller, QC, Counsel to Nekaneet First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, August 30, 1996.

4 Thomas Waller, QC, Counsel to Nekaneet First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, November 12, 1996. See below for more information on Planning Conferences.

5 Indian Claims Commission, Planning Conference, Nekaneet First Nation, Treaty Entitlement for Benefits, Summary, Regina, November 21, 1996.

despite the fact it was submitted ten years earlier, remained under review by the Specific Claims Branch and that the claim had not been rejected by DIAND.

The First Nation took the position that DIAND's failure to respond to the claim for nearly 10 years was tantamount to a rejection of the claim.[6] DIAND then informed the parties that this claim was now a priority and that DIAND would provide a response by May 1997. The First Nation consented to this time frame. Further, the Commission agreed, at the First Nation's request and DIAND's consent, to act as a facilitator on the claim.[7] In the view of the Commission, it is the very fact that the First Nation requested a Commission inquiry that pushed this claim forward.

Subsequently, correspondence was exchanged among the parties with a view to facilitating DIAND's review of the claim.[8] On July 25, 1997, the Commission scheduled a conference call which dealt with the status of the review.[9] DIAND informed the parties that it would provide a written response to the claim on August 1, 1997, and that the parties would meet on October 6, 1997, to discuss the response with members of the First Nation and their counsel.

On August 1, 1997, DIAND provided a written summary of the preliminary federal position on the claim of the Nekaneet First Nation claim on a "without prejudice" basis.[10] The preliminary

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6 Indian Claims Commission, Planning Conference, Nekaneet First Nation, Treaty Entitlement for Benefits, Summary, Regina, November 21, 1996. See also ICC Report on the Inquiry into the claim of the Mikisew Cree First Nation in (1998) 6 ICCP 183 for a discussion of constructive rejection.

7 Indian Claims Commission, Planning Conference, Nekaneet First Nation, Treaty Entitlement for Benefits, Summary, Regina, November 21, 1996.

8 Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Belinda Cole, DIAND, January 24, 1997; Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Cynthia Shipton-Mitchell, Acting Senior Counsel, Specific Claims, DIAND, March, 3, 1997; Cynthia Shipton-Mitchell, Acting Senior Counsel, Specific Claims, DIAND, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, March 6, 1997; Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Cynthia Shipton-Mitchell, Acting Senior Counsel, Specific Claims, DIAND, May 6, 1997; Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Cynthia Shipton-Mitchell, Acting Senior Counsel, Specific Claims, DIAND, June 6, 1997; Thomas Waller, QC, Counsel to Nekaneet First Nation, to Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, June 6, 1997; Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, and Perry Robinson, Policy Directorate, Specific Claims Branch, DIAND, June 17, 1997.

9 Kathleen Lickers, Associate Legal Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, and Jocelyn Stoate, Specific Claims Branch, DIAND, July 25, 1997.

10 Michael Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997.

position was to reject the claim, except for the entitlements to receive farming and agricultural implements, subject to additional research on the matter.

In response, the First Nation requested a letter of support from the Commission for its application to DIAND's Research Funding Division. To maintain its neutrality, the Commission declined to provide such support.[11] It did, however, offer to provide the Research Funding Division with a brief summary of the claim and its status at the Commission.[12]

On November 4, 1997, the Commission advised DIAND that the Nekaneet First Nation had entered the Commission's inquiry process and that additional research was therefore required.[13] The research, including an analysis of the claim, was provided by DIAND on March 27, 1998.[14] The Commission advised the parties of the status of the claim throughout the year.[15] On October 23, 1998, Canada offered to accept the First Nation's claim for negotiation of a settlement, with respect to its claim to agricultural benefits under Treaty 4; Canada also offered to negotiate ammunition and twine benefits.[16]

This report sets out the background to the First Nation's claim and is based entirely on the documents the First Nation provided to the Commission, as well as the March 1998 Specific Claims Branch Report.[17] In view of Canada's decision to accept the claim for negotiation of a settlement,

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11 Seetal Sunga, Associate Legal Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, September 15, 1997.

12 Seetal Sunga, Associate Legal Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, September 15, 1997.

13 Seetal Sunga, Associate Legal Counsel, Indian Claims Commission, to Sharman Glynn, Chief, Research Funding Division, DIAND, November 4, 1997.

14 Cover letter, Barb Frizell-Bear, Senior Policy Advisor, Policy and Research, Specific Claims Branch, to Ralph Keesickquayash, Associate Counsel, Indian Claims Commission, March 27, 1998, attaching Specific Claims Branch, T.M. Homik, Analysis of the Claim of the Nekaneet First Nation Regarding Agricultural Benefits, January 31, 1998 (hereinafter Specific Claims Branch Report).

15 Ralph Keesickquayash, Associate Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, May 7, 1998; Ron Maurice, Commission Counsel, Indian Claims Commission, to Thomas Waller, QC, Counsel to Nekaneet First Nation, and Jocelyn Stoate, Specific Claims Branch, DIAND, May 7, 1998.

16 Warren Johnson, Assistant Deputy Minister, DIAND, to Chief Larry Oakes, Nekaneet First Nation, October 23, 1998 (Appendix B).

17 See below, discussion on page 15.

no further steps have been taken by the Commission to inquire into the claim, and we make no findings of fact. This report contains a brief summary of the claim and is intended only to inform the public about the nature of the issues involved.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. The Commission is empowered to inquire into and report on whether or not Canada properly rejected a specific claim:

> AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[18]

If the Commission had completed the inquiry into the Nekaneet First Nation's claim, the Commissioners would have evaluated that claim based on Canada's Specific Claims Policy. DIAND has explained the policy in a booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[19] In particular, the booklet states that, when considering specific claims:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.

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[18] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991; reprinted in (1994) 1 ICCP xv.

[19] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
iv) An illegal disposition of Indian land.

The policy also addresses the following types of claims, which fall under the heading "Beyond Lawful Obligation":

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[20]

The Commission has the authority to review thoroughly, with both the claimant and the government, the historical and legal bases for the claim and the reasons for its rejection .The *Inquiries Act* gives the Commission wide powers to conduct such an inquiry, to gather information, and even to subpoena evidence if necessary. If, at the end of an inquiry, the Commission concludes that the facts and law support a finding that Canada owes an outstanding lawful obligation to the claimant First Nation, it may recommend to the Minister of Indian Affairs and Northern Development that the claim be accepted for negotiation.

THE CLAIMS PROCESS

As outlined in *Outstanding Business*, a First Nation may submit its specific claim to the Minister of Indian Affairs, who acts on behalf of the Government of Canada. The claimant First Nation begins the process by submitting a clear and concise statement of claim, along with comprehensive historical and factual background on which the claim is based. The claim is referred to DIAND's Specific Claims Branch, which usually conducts its own confirming research into a claim, makes claim-related research findings in its possession available to the claimants, and consults with them at each stage of the review process.

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20 *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179-80.

Once all the necessary information has been gathered, the facts and documents will be referred to the Department of Justice for advice on the federal government's lawful obligation. Generally, if the Department of Justice finds that the claim discloses an outstanding lawful obligation, the First Nation is so advised, and the Specific Claims Branch will offer to enter into compensation negotiations.

The Commission's Planning Conferences

In view of the Commissioners' broad authority to "adopt such methods . . . as they may consider expedient for the conduct of the inquiry," they have placed great emphasis on the need for flexibility and informality and have encouraged the parties to be involved as much as is practicable in the planning and conduct of the inquiry. To this end, the Commission developed the planning conference as a forum in which representatives of the First Nation and Canada meet to discuss and resolve issues in a cooperative manner.

Planning conferences have routinely been arranged and chaired by the Commission to plan jointly the inquiry process. Briefing material is prepared by the Commission and sent to the parties in advance of the planning conference so as to facilitate an informed discussion of the issues. The main objectives of the planning conference are to identify and explore the relevant historical and legal issues; to identify which historical documents the parties intend to rely on; to determine whether the parties intend to call elders, community members, or experts as witnesses; and to set time frames for the remaining stages of the inquiry, in the event that the parties are unable to resolve the matters in dispute. The first planning conference also allows the parties an opportunity to discuss whether there are any preliminary issues with regard to the scope of the issues or the mandate of the Commission.

Depending on the nature and complexity of the issues, there may be more than one planning conference. The parties are given an opportunity, often for the first time, to discuss the claim face to face. The parties themselves are able to review their position in the light of new or previously unrevealed facts and the constantly evolving law. Even if the planning conferences do not lead to a resolution of the claim and a formal inquiry process is necessary, they assist in clarifying issues and help make the inquiry more effective.

PART II

HISTORICAL BACKGROUND

BACKGROUND TO THE FIRST NATION'S CLAIM

As this claim was accepted before an inquiry was complete, the Commission makes no finding of fact. This background summarizes documents provided to the Commission by the First Nation and Canada.

The Nekaneet First Nation is located in southwestern Saskatchewan. On September 15, 1874, Treaty 4 was entered into between Canada and First Nations in the area. At that time, "Front Man" or "Foremost Man" (the English name for "Ne-can-ete") was the leader of what became known as the Nekaneet Band. This claim raises three questions of historical fact: whether Foremost Man and his followers were separate or a part of the Kahkewistahaw Band; whether they received treaty entitlements including reserve land; and whether they took up agriculture, thereby entitling them to agricultural benefits under Treaty 4.

The Nekaneet First Nation takes the position that, at the time Treaty 4 was signed by Chief Kahkewistahaw at Fort Qu'Appelle, Foremost Man was the leader of a separate band and was not at Fort Qu'Appelle at the time of the treaty's signing but was instead living in the area around Cypress Hills.[21] "Ne-can-ete," however, was noted on the 1875 and 1876 Treaty 4 paylists for the Kahkewistahaw Band.[22]

Treaty 4 includes the following obligations, which were undertaken by Canada:[23]

> As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable

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21 1987 Nekaneet Claim Submission, p. 1.

22 The historical context for the signing of Treaty 4 has been dealt with by the Commission in its March 1996 Report into the Treaty Land Entitlement Claim of the Kawacatoose First Nation, and in the November 1996 report into the Kahkewistahaw treaty land entitlement. The Kahkewistahaw report has a more complete description of Foremost Man and his relationship to the Kahkewistahaw Band.

23 "The Qu'Appelle Treaty, Number Four," September 15, 1874, reprinted in A. Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles, 1979), 330-35, cited in Specific Claims Branch Report, attached doc. 1 [Note: The Specific Claims Branch Report contains numbered documents, which are attached to the report and/or included in the Appendix.]

> season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.
>
> Her Majesty also agrees that each Chief and each Headman, not to exceed four in each band, once in every three years during the term of their offices shall receive a suitable suit of clothing, and that yearly and every year She will cause to be distributed among the different bands included in the limits of this treaty powder, shot, ball and twine, in all to the value of seven hundred and fifty dollars; and each Chief shall receive hereafter, in recognition of the closing of the treaty, a suitable flag.
>
> It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone, all the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.

In short, there was a provision for entitlements to cash payments, clothing, ammunition, and twine, as well as to "cows and plows."

Annuity payments were provided to Foremost Man and his followers under Treaty 4 in 1881 and 1882 at Fort Walsh.[24] In 1882, Canada established a policy whereby only those bands that left the Cypress Hills and settled on reserves further north would receive their treaty benefits.[25] Foremost Man and his followers refused to relocate north. Then and now, the Nekaneet First Nation takes the

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[24] DIAND file 675/30-14-15-160A; A.E. St. Louis, "Straggling Indians of Cypress Hills and Vicinity," nd [c. 1945] (Specific Claims Branch Report, Appendix A, doc. 191). See also 1987 Nekaneet Claim Submission, p. 3.

[25] DIAND file 675/30-14-15-160A. A.E. St. Louis, "Straggling Indians of Cypress Hills and Vicinity," nd [c. 1945] (Specific Claims Branch Report, Appendix A, doc. 191). See also 1987 Nekaneet Claim Submission, p. 3.

position that it had been given a reserve near Maple Creek in 1881 by Canada.[26] In any event, the First Nation received no annuity payments between 1882 and 1975.

From 1882 to 1913, Canada denied that a reserve had been set aside for the Nekaneet First Nation, or otherwise for Foremost Man's followers and descendants.[27] The First Nation cites Indian Affairs correspondence to the effect that during this time period Canada was aware of a separate band that had not been allocated lands.[28] In 1913, Canada set aside a reserve of 1440 acres for the "band of Indians living in the vicinity of Maple Creek, in the Province of Saskatchewan."[29]

That same year, the Chief Inspector of Indian Agencies recommended that a farm instructor be placed on the Maple Creek Reserve, for the purpose of encouraging the cultivation of land "for gardens and small oat fields."[30] That recommendation was rejected, however. The Chief Inspector continued to ask for a farming instructor, and in 1914 Canada authorized an expenditure of funds to fence the reserve.[31]

Significantly, for the purposes of this claim, it appears that three requests for assistance were made by the First Nation. In 1961, a request was made for horses, as discussed below.[32] In 1914, two written requests were made by the Band for unspecified assistance. The first was a letter from a Band representative requesting that Canada dispatch someone "to look into the conditions of our little Reserve . . . as we find it hard to make a living under present conditions, as there is very little work

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26 Specific Claims Branch Report, pp. 4-5; 1987 Nekaneet Claim Submission, pp. 3-4.

27 Specific Claims Branch Report, p. 5.

28 1987 Nekaneet Claim Submission, pp. 5-6.

29 DIAND file 675/30-14-15-160A; Order in Council PC 2004, August 2, 1913 (Specific Claims Branch Report, attached doc. 4).

30 National Archives of Canada (hereafter NA), RG 10, vol. 7779, file 27140, Glen Campbell to Duncan C. Scott, December 9, 1913 (Specific Claims Branch Report, attached doc. 5).

31 Specific Claims Branch Report, p. 5.

32 NA, RG 10, vol. 8829, file 675/15-8, pt. 4, Charles Oakes to Department of Indian Affairs, September 7, 1961 (Specific Claims Branch Report, attached doc. 61). See discussion below, page 11.

going on at present – and would like the Government to assist us."[33] On visiting the reserve, the Inspector of Indian Agencies reported that assistance should not be granted "in the way of rations."[34] In his report, he further cautioned against attempts "to start these few Indians farming," since "their land is not adapted for it and it is not in a farming district." He went on to state: "[T]he Indians know nothing about farming and will never learn. They can grow a few potatoes every year, but this is all. . . . I saw a small patch of potatoes, poorly put in, and I doubt if they will get anything from it."[35] The Inspector's editorial comments notwithstanding, this report provides evidence that some farming was taking place on the reserve.

The second request for "some assistance" in 1914 came from a member of the Maple Creek Band, on the basis that they were "absolutely destitute."[36] The letter went on to describe the state of their farming efforts:

> In this district this year there was a total failur[e] of crop and it was impossible for us to obtain anything from our land to sustain us this year and it is in consequence of [this] total failure of the crop that it has [compelled] us to apply to the government for assistance.[37]

On visiting the reserve, the Inspector arranged for the provision of rations for a dozen "old and infirm" members of the Band, and recommended that the Band be relocated to "one of the existing reserves where there is established management."[38] In his report, however, the Inspector determined

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[33] NA, RG 10, vol. 7779, file 27140, Crooked Legs to Minister of the Interior, May 29, 1914 (Specific Claims Branch Report, attached doc. 10).

[34] NA, RG 10, vol. 7779, file 27140, W.M. Graham to the Secretary, Department of Indian Affairs, June 20, 1914 (Specific Claims Branch Report, Appendix A, doc. 149).

[35] NA, RG 10, vol. 7779, file 27140, W.M. Graham to the Secretary, Department of Indian Affairs, June 20, 1914 (Specific Claims Branch Report, Appendix A, doc. 149).

[36] NA, RG 10, vol. 7779, file 27140, Stoney Indian to Department of Indian Affairs, October 24, 1914 (Specific Claims Branch Report, Appendix A, doc. 151).

[37] NA, RG 10, vol 7779, file 27140, Stoney Indian to Department of Indian Affairs, October 24, 1914 (Specific Claims Branch Report, Appendix A, doc. 151).

[38] NA, RG 10, vol. 7779, file 27140, W.M. Graham to the Secretary, Department of Indian Affairs, November 19, 1914 (Specific Claims Branch Report, attached doc. 153).

that "there is a market for wood, pickets and hay and I understand they have about twenty-five loads of the latter for sale."[39] The Band refused to move.

Reports from Canada continued to recommend the relocation of the Band through to the mid-1950s, with the Band always refusing to move. The view of the department appears to have been based, rightly or wrongly, on the conclusion that the reserve was made up of lands unsuited for agricultural development.[40] For instance, in 1944, the department was advised that the Band had broken 15 acres of reserve land, and that there was not enough hay to feed the Band's own horses.[41] Another 1944 report indicated that the Band "showed a certain amount of initiative, they have worked out, generally well, in such work as Haying and harvest, repairing fences etc., and they have rented small parcels of land on shares near the Reserve to try and get their feed and some crop."[42]

In 1955, the Assistant Regional Supervisor of Indian Agencies, J.T. Warden, recommended that land adjacent to the reserve be purchased, as the existing reserve was well suited for pasture, and the proposed additional lands produced good crops of hay and coarse grains.[43] After further study and investigation, additional lands were set aside for the reserve in 1958 and funding was approved for the provision of farming equipment and livestock.[44]

The scant evidence available indicates that the Band successfully raised cattle in the ensuing decades. In 1961 the Band requested horses, pursuant to its understanding that Treaty 4 provided this benefit.[45] At the time, Canada expressed the view that Treaty 4 did not entitle the Band to a supply

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[39] NA, RG 10, vol 7779, file 27140, W.M. Graham to the Secretary, Department of Indian Affairs, November 19, 1914 (Specific Claims Branch Report, attached doc. 153).

[40] Specific Claims Branch Report, pp. 5-9.

[41] NA, RG 10, vol. 7779, file 27140, M. Christianson to Indian Affairs Branch, May 3, 1944 (Specific Claims Branch Report, Appendix A, doc. 149).

[42] NA, RG 10, vol. 7779, file 27140, Sgt. Fleming to M. Christianson, July 14, 1944 (Specific Claims Branch Report, Appendix A, doc. 180).

[43] DIAND, J.T. Warden to Indian Affairs Branch, Reserves and Trusts Division, September 19, 1955 (Specific Claims Branch Report, attached doc. 40).

[44] Specific Claims Branch Report, pp. 12-17.

[45] NA, RG 10, vol. 8829, file 675/15-8, pt. 4, Charles Oakes to Department of Indian Affairs, September 7, 1961 (Specific Claims Branch Report, attached doc. 61).

of horses,[46] but there is no evidence that the request was denied. In 1965, Band members owned 43 head of cattle, which increased to 60 head by 1968.[47] However, the Specific Claims Branch Report concludes that there is no evidence of the Band cultivating lands, nor of the Band receiving the agricultural equipment as proposed in the mid-1950s.[48] It appears that the department purchased one bull for the Band in 1958 and replaced it with another in 1963.[49]

No evidence was located that the Band ever received hunting and fishing supplies pursuant to treaty entitlements.[50] In 1976, Canada denied any entitlement to hunting and fishing supplies to the Band,[51] and as late as 1985 the evidence indicates that the Nekaneet First Nation received no such treaty entitlements.[52]

In 1975, Canada determined that members of the First Nation were entitled to annuities by virtue of the fact that treaties had been executed on behalf of their ancestors "by the Chiefs of the Bands to which they then belonged." Further, Canada paid the Band members in accordance with the terms of Treaty 4, on the basis that their reserve was located in territory under that treaty.

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[46] NA, RG 10, vol. 8829, file 675/15-8, M.G. Jutras to Regional Supervisor, Saskatchewan, October 18, 1961 (Specific Claims Branch Report, attached doc. 62); NA, RG 10, vol. 8829, file 675/15-8, R.F. Battle to Superintendent, File Hills–Qu'Appelle Agency, September 15, 1961 (Specific Claims Branch Report, attached doc. 63).

[47] DIAND file 675/23-12, vol. 2, "Annual Inventory of Livestock – Year-end-Inventory as at December 31, [1965]" (Specific Claims Branch Report, attached doc. 65; DIAND file 675/15-8, vol. 5, "Project/Design Authority – 1969-70" (Specific Claims Branch Report, attached doc. 66).

[48] Specific Claims Branch Report, p. 15.

[49] NA, RG 10, vol. 7779, file 27140, M.G. Jutras to Regional Supervisor, Saskatchewan, March 21, 1961 (Specific Claims Branch Report, attached doc. 59); NA, RG 10, vol. 7779, file 27140, H.A. Matthews to Regional Supervisor, Saskatchewan, July 9, 1963 (Specific Claims Branch Report, Appendix A, doc. 64).

[50] Specific Claims Branch Report, p. 15.

[51] DIAND file 675/28-3, vol. 8, Director General, Operations to Distinct Manager, Touchwood File Hills–Qu'Appelle District, June 11, 1976 (Specific Claims Branch Report, Appendix A, doc. 72).

[52] Specific Claims Branch Report, p. 19.

According to the Specific Claims Branch Report, Canada "subsequently" determined that the Band was entitled to Treaty 4 benefits, subject to the treaty's terms.[53]

This summary reflects the evidence available to date. The Specific Claims Branch Report advises that the evidence available was often incomplete, in part because of DIAND's own practices.[54]

First Nation's Submissions

1987 Nekaneet Claim Submission

The 1987 Nekaneet Claim Submission[55] sought compensation for Canada's alleged failure to provide the following: "farm implements, equipment and suppliers [sic] to the band"; "program and other funding to the band"; and "annual payments to members of the band." In addition, the Band sought damages "resulting from the Crown's failure to establish a reserve for members of the band between the signing of Treaty No. 4 and 1913, when lands were first set apart for the use and benefit of the band members."[56]

The submission refers to facts covering the period from 1874 to the time of its writing in 1987. The evidence cited "relied extensively upon research previously done including a report prepared by Dr John L. Tobias for the Federation of Saskatchewan Indian Nations."[57] The First Nation notes that independent verification of that research was not feasible, but that it believes that the information is accurate. Accordingly, the secondary sources cited in the report are not attached as evidence. Instead, references are made to originals that may be obtained from "archival materials

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53 DIAND file E4058-3, vol. 1, J.R. Wright to David Lee, December 3, 1981 (Specific Claims Branch Report, attached doc. 3).

54 Specific Claims Branch Report, p. 1: "[T]he study was hampered by a lack of extensive documentation concerning the Band's activities over the years. Some of this was due to the Band's isolation and the belief among some Department officials that the Band was not entitled to treaty benefits. In other cases, Departmental files that potentially could have shed light on the Band's activities have been destroyed."

55 See Appendix A.

56 1987 Nekaneet Claim Submission, p. 1.

57 1987 Nekaneet Claim Submission, p. 2.

of Canada in Ottawa."[58] Such references date from 1874 to 1957. The only reference to events subsequent to 1987 is the submission's final statement in the section entitled Historical Facts:

> To this day, the band faces enormous problems in attempting to maintain its members. There are few jobs on the reserve. The land itself continues to be incapable of supporting economic activity to an extent which can benefit more than a very few band members. The vast majority of band members seeking employment are forced to look off the reserve. The situation can only improve if the band obtains land which can be used as a basis for farming, ranching or other enterprises.[59]

The remainder of the First Nation's submissions on historical facts generally anticipate the evidence cited in the Specific Claims Branch Report.

The Band submits that an "outstanding 'lawful obligation'" arises from the non-fulfilment of Treaty 4 and the breach of the *Indian Act*, pursuant to Canada's Specific Claims Policy. The submission asserts that entitlement to benefits under Treaty 4 is borne out by both the evidence and Canada's own conduct, including the payment of annuities in 1881 and 1882 to Foremost Man and his followers, and the establishment of a reserve in 1913. The Band further submits that DIAND "has, since 1968, recognized the band as a separate band," and later states that economic payments "were resumed in 1968."[60] The latter statement of fact is not referred to in the submission's own section on Historical Facts; nor does it appear in the body of the submission. Nor does the Specific Claims Branch Report indicate any evidence supporting this particular fact.

The First Nation goes on to make submissions respecting the Crown's fiduciary duty to the claimants, citing *Guerin v. The Queen* in support.[61] The 1987 submission states that the duty was recognized by the Crown in its rendering of economic benefits, however sporadic; by its attempts to relocate the First Nation throughout this century; and by its establishment of the reserve near Maple Creek. The Crown's breach of this fiduciary duty is "clear from a review of the history of the

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[58] 1987 Nekaneet Claim Submission, p. 2.

[59] 1987 Nekaneet Claim Submission, p. 9.

[60] 1987 Nekaneet Claim Submission, p. 11.

[61] Specific Claims Branch Report, pp. 11-12. Note that, at the time of its writing, *Guerin v. The Queen*, [1984] 2 SCR 355, was the leading case on point.

band," and further arises from "the total abdication of the Department's responsibility" to the First Nation.[62] The 1987 Nekaneet Claim Submission states repeatedly that for many years Canada has been aware of the nature and extent of the First Nation's claim.[63]

The 1987 Nekaneet Claim Submission seeks the validation of the claim "as quickly as possible." The compensation sought is described only as "substantial," and it is conceded that "some additional work will be required prior to presenting a full and detailed claim for compensation." Further, the First Nation seeks "funding to more accurately determine the extent of the compensation." The authors and their counsel express their willingness to meet with DIAND officials and to assist in any further research required to move the process forward, for which an "early response" is requested.[64]

1996 Band Council Resolution

The Nekaneet First Nation passed a Band Council Resolution on August 29, 1996, requesting that the Indian Claims Commission conduct an inquiry into its 1987 claim, and authorizing the disclosure of relevant reports to the Commission.[65] The resolution attaches the 1987 Nekaneet Claim Submission. The resolution's preamble states that "the claim has never formally been rejected or accepted by Canada for negotiation although there has been some indication from Departmental officials that Canada believes the scope of the claim is outside of the Specific Claims Policy."

1998 Specific Claims Branch Report

The March 1998 report prepared by Teresa Homik for the Specific Claims Branch on the Nekaneet claim includes the following observations and conclusions:

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62 Specific Claims Branch Report, pp. 12-13.

63 Specific Claims Branch Report, pp. 2, 14.

64 Specific Claims Branch Report, p. 14.

65 Nekaneet First Nation, Band Council Resolution, August 29, 1996.

[T]he evidence does not indicate that the Band made any clear unequivocal "election" or statement that they intended to take up agriculture.... The evidence does indicate, however, that the Band did cultivate gardens as early as 1914 ...

The evidence of agricultural activity on the Reserve in the 1950's is far less equivocal.... [H]owever, no evidence was located that would indicate that the Band received implements or agricultural supplies, other than the bulls discussed above. It also appears that they did not receive treaty hunting and fishing supplies, due to the belief on the part of the Department officials that they were not entitled to those benefits....

In conclusion, therefore, it may be observed that there exists no clear evidence that the Band ever articulated an intention to cultivate or made an express request for farming supplies, other than a 1961 request for horses pursuant to a belief that Treaty 4 provided this benefit. The evidence does not clearly establish that the above request was denied, but it is clear that Departmental officials felt that there was no treaty obligation to provide horses....

It may also be observed that the Band actually carried on certain agricultural activities, albeit in a primitive way, beginning in 1914. These activities ranged from gardens, which apparently failed to the cultivation of feed and forage crops for horses, and culminated in a small scale cattle raising in the 1960's.[66]

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[66] Specific Claims Branch Report, pp. 20-21.

PART III

ISSUES

The Nekaneet claim to the Minister raises issues of whether, under Treaty 4, there was an existing and outstanding lawful obligation on the part of Canada to provide agricultural, economic, and other benefits to the First Nation. As stated in the 1987 claims submission, the Nekaneet First Nation seeks compensation for Canada's alleged failure to provide farm implements and equipment, program and other funding, and annuities. The Nekaneet also seek damages resulting from the federal government's failure to establish a reserve until 1913. These issues hinge on the questions of historical fact just discussed. Did the Nekaneet First Nation exist as a Band separate from the Kahkewistahaw in 1874, therefore entitling the Nekaneet to treaty land and other benefits? Did the Nekaneet take up agriculture, therefore entitling them to treaty agricultural benefits?

PART IV

SUBMISSIONS

As discussed previously, the parties initially disagreed as to whether the Commission was authorized to conduct an inquiry. The question was whether the First Nation's claim had been rejected by the Minister. In 1996, the claimant asked the Commission to conclude that DIAND's conduct in the almost 10 years since the First Nation submitted its claim was tantamount to a rejection.[67] DIAND's preliminary position was that a lawful obligation did not arise out of the claim, subject to the following finding, as stated in its letter of August 1, 1997:

> However, with respect to the First Nation's allegation that Canada was obligated to provide the First Nation with farming and agricultural implements, it is our position that the Nekaneet First Nation may be entitled to receive farming implements if its members choose to take up the pursuit of cultivating the soil or raising stock on reserve. Nonetheless, additional research may be required to determine whether or not the First Nation received this entitlement in the past.[68]

DIAND discussed each of the First Nation's claims under the following headings.

FARMING AND AGRICULTURAL IMPLEMENTS

As discussed in DIAND's letter, Treaties 4 and 6 provide for certain farming and agricultural implements to be supplied to First Nations for purposes of self-sufficiency. The articles, machines, and cattle referred to in the treaties were to be given "once and for all, for the encouragement of the practice of agriculture among the Indians." The treaties stipulate that the quantity of the equipment provided is determined on a per family basis, if the family chose an agricultural way of life. That is, Treaty 4 states that the items are to be supplied to any Treaty 4 First Nation:

> who are *now actually* cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family *so actually cultivating*, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough

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[67] See page 15 for a discussion of the 1996 Band Council Resolution.

[68] Michael Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997.

> and two harrows for every ten families *so cultivating as aforesaid*, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone.[69]

DIAND then described the prerequisite elements for receipt of farming and agricultural implements as follows: "1. The band must elect a reserve; and 2. The band must elect a) to cultivate their soil or b) to raise stock."[70]

DIAND denied that there was an outstanding lawful obligation to provide the farming and agricultural entitlements until such time as "the First Nation chooses, after reserve land has been selected, to take up the pursuit of cultivated the soil or raising stock." On request and receipt of such implements, the obligation will be fulfilled.[71]

According to DIAND, there remained a question of fact that required "additional research to determine whether the First Nation received this entitlement in the past." If the 1987 claim constituted an election or request for the implements, then these entitlements would be provided "based on the number of families who state their intention to cultivate the soil and raise cattle on reserve."[72] According to DIAND, the First Nation could instead elect to "continue the traditional activities of hunting and fishing," in which case it would be entitled to ammunition and twine.[73]

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[69] "The Qu'Appelle Treaty, Number Four," September 15, 1874, reprinted in A. Morris, *The Treaties of Canada with the Indians* (1880; reprint, Toronto: Coles, 1979), 330-35, cited in Specific Claims Branch Report. Emphasis added.

[70] Michael Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997.

[71] Michael Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 3.

[72] Michael Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 3.

[73] Michael Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 3.

Programs and Other Funding

DIAND asserted that there was no outstanding lawful obligation to DIAND programs and services as there was no evidence provided to DIAND indicating "what, if any program and services it applied for, and whether [or] not it has ever been denied access to any such programs or services."[74]

Annual Payments to Members

As the right to annuity payments is personal, DIAND stated that the Specific Claims Policy did not entitle First Nations to advance claims on behalf of its members. "Any outstanding annuity payments that can be recovered by living members of the First Nation, must be recovered by these members directly." To initiate that process, DIAND provided information for contacting the relevant official. A separate official was identified for the purposes of bringing a claim for treaty annuities for deceased band members.[75]

In sum, on August 1, 1997, Canada denied that there was an outstanding lawful obligation, but raised the possibility that agricultural entitlements may be outstanding, subject to further research. As discussed previously, research was provided by DIAND on March 27, 1998.[76]

Canada's Offer to Negotiate a Settlement

On October 23, 1998, Canada offered to accept the First Nation's claim to agricultural benefits under Treaty 4 for negotiation of a settlement; as well, Canada offered to negotiate ammunition and twine benefits.[77] According to Canada, this was the first agricultural benefits claim Canada had ever accepted under Treaty 4, and the first historical claim for agricultural benefits accepted by Canada.[78] As a result, the Commission has suspended this inquiry.

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[74] Michael Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 3.

[75] Michael Roy, Director General, Specific Claims, DIAND, to Chief Larry Oakes, Nekaneet First Nation, August 1, 1997, p. 4.

[76] Specific Claims Branch Report. See above, page 1ff.

[77] Warren Johnson, Assistant Deputy Minister, DIAND, to Chief Larry Oakes, Nekaneet First Nation, October 23, 1998 (Appendix B).

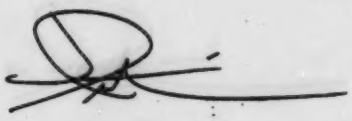
[78] Warren Johnston, Assistant Deputy Minister, DIAND, to Chief Larry Oakes, Nekaneet First Nation, October 23, 1998 (Appendix B).

PART V

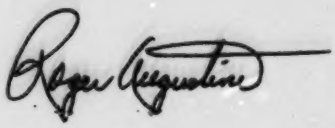
CONCLUSION

Since, at the date of this report, the Minister has agreed to negotiate the claim, the Commission has suspended its inquiry. We make no findings of fact or any comment on the merits of the First Nation's claim for economic benefits under Treaty 4. This report has set out the background to the First Nation's claim, based on documents the First Nation provided, and Canada's response thereto. In making this report, we wish again to affirm that it is essential that procedural and systematic issues in the specific claims process not be allowed to frustrate the timely determination of individual claims, or the timely negotiation and settlement of those claims that have been accepted by Canada for negotiation. Just as fairness was the criterion governing the decision to conduct a Commission inquiry into the First Nation's claim, so fairness to the parties must be the criterion that guides the conduct of both sides in seeking the resolution of a First Nation's claim.

FOR THE INDIAN CLAIMS COMMISSION



P.E. James Prentice, QC
Commission Co-Chair



Roger J. Augustine
Commissioner

Dated this 17th day of March, 1999.

APPENDIX A

1987 NEKANEET CLAIM SUBMISSION

SUBMISSION

TO

THE MINISTER OF INDIAN AND NORTHERN AFFAIRS

BY THE NIKANEET BAND NO. 160A

February 16, 1987

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CLAIM OF NIKANEET BAND NO. 160A

I INTRODUCTION

This submission is a summary of the claim of the Nikaneet Indian Band No. 160A arising out of the Government of Canada's failure to provide funding to the band and band members during a period extending from 1883 until 1968. The submission is made to the Minister under the government policy entitled "Outstanding Business, a Native Claims Policy."

The band seeks a recognition of the validity of its claim together with compensation for losses and damages sustained. The claim is made on the basis of a failure on the part of Canada to honour the terms of Treaty No. 4 and on the basis of Canada's failure to provide benefits to the band under the terms of the Indian Act as well as on the basis of a breach of the duty owed by the Crown to the band and its members.

Compensation is sought for Canada's failure to provide the following:

1. the failure to provide farm implements, equipment and suppliers to the band,
2. the failure to provide program and other funding to the band, and
3. the failure to provide annual payments to members of the band.

The claim also includes a claim for damages resulting from the Crown's failure to establish a reserve for the members of the band between the signing of Treaty No. 4 and 1913, when lands were first set apart for the use and benefit of band members.

The federal government is aware of many aspects of the within claim since consideration of the historical material was given prior to validation of the band's entitlement claim.

In preparing this submission references are included in the footnotes to historical records or documents. The originals of this documentation are found in the archival materials of Canada in Ottawa. Footnote references which are contained in this submission have relied extensively upon research previously done including a report prepared by Dr. John L. Tobias for the Federation of Saskatchewan Indian Nations. The claimants believe that the footnote references are accurate but have not had the financial resources to verify such footnotes in all cases.

I HISTORICAL FACTS

The facts, which the band submits are relevant to the claim, are briefly summarized as follows:

1. The Nikaneet Band (as it is now known) joined Treaty No. 4 in 1874 under the leadership of Frontman or Foremost Man. [1.] Although some of the internal documentation of the Department of Indian Affairs and Northern Development (the Department) suggests that Foremost Man was associated with the Kakuwistahaw Band, the band's view is that Foremost Man was the leader of a separate band. At the time of signing of Treaty No. 4 Foremost Man was not in Qu'Appelle but was in the west in the area around Cypress Hills.

2. Under the terms of Treaty No. 4, Indians were promised annual cash payments in the following terms:

> "As soon as possible after the execution of this Treaty, Her Majesty shall cause a census to be taken of all Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified for that purpose, within the territory ceded, each Chief $25.00; each headman not exceeding four to a band, $15.00; and to every other Indian man, woman and child, $5.00 per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable."

The Treaty also included terms for the provision of farm implements, equipment and other supplies. [2.]

3. It is clear from records at the Department that Treaty payments were made to Foremost Man's band in 1881 and in 1882. According to the Department's records the annuity pay list for 1881 showed a band consisting of 428 persons

receiving payments. In 1882, the pay list showed 300 persons as having been paid. [3.]

4. After 1882, annual payments were not made by the Department until they were resumed in 1968.

5. Following 1882, various reasons were advanced by the Department for not making payments. However, these reasons appear to relate either to the expense of administering a single reserve in the area or the view of some that the presence of the band in the Cypress Hills near the Canada/United States border might cause an international incident. [4.]

6. It is clear from the Department records that Foremost Man had been promised a reserve in 1881 and in 1884 still was pursuing his selection. [5.]

7. Promises were made to establish a reserve if the band moved north and pressure was put on the band, particularly following the Riel rebellion in 1886. It is apparent that Commissioner Dewdney was of the view that the band should be offered a reserve near Last Mountain. Commission Dewdney was not successful in obtaining agreement from the band on the relocation and was not authorized to carry out his alternate plan of jailing the Chief in an attempt to force the band to move. [6.]

8. It is apparent that the band remained as a unit, their numbers in fact increasing by the addition of other Indians dissatisfied with their Chiefs or reserves. This larger group appears to have divided into two with one group

centered around Medicine Hat. The second group however remained with Foremost Man in the Maple Creek area. [7.]

9. It is clear from the Department's files that the local population around Maple Creek regarded Foremost Man's band as an Indian band. [8.] In February, 1896, a petition was forwarded to the Minister of the Interior asking that the band be given a reserve in the Cypress Hills promised to it in 1881. [9.]

10. In 1906 the Indian Commissioner, David Laird, suggested the establishment of a reserve near the Mounted Police barracks in the Cypress Hills. [10.] The Department however followed the recommendation of Agency Inspector Campbell to the effect that so long as the band remained inoffensive to the settlers and no complaints were heard, no action should be taken. [11.]

11. Frank Pedley, then the Deputy Superintendent General of Indian Affairs, in a letter to William Graham, Inspector of Indian Agencies in the region, acknowledged that there were members of the band who had not been allocated lands. This correspondence reads, in part, as follows:

> "...these appear to be of two classes, viz, some who belong to bands for whom reserves had been provided in the past, but have refused to live thereon, and some for whom no such provision has been made."
>
> "...With regard to the Stragglers for whom lands have not been already provided, and the others if it should be deemed advisable to let them all keep together, the question presents itself as to where and what quantity lands should be allocated to them, and this would seem to depend largely upon the means by which they propose to earn their maintenance in the event of their being willing to take up agriculture, etc. The further question arises as to whether they would require a

> farming instructor and what assistance in the form of rations, implements, etc., etc. would be necessary. Of course the numbers in each class have to be ascertained." [12.]

It is submitted that this correspondence establishes clearly that the Department was aware and recognized there was a separate band which had not been allocated lands. The correspondence also clearly established the fact that farming equipment and implements promised under the Treaty had not been provided.

12. On August 2, 1913, an Order in Council was passed setting aside Sections 24, 25 and a portion of Section 26 in Township 9, Range 25, W 3rd Meridian, for the Maple Creek Band. This action was taken in spite of the objection of Inspector Graham who continued in his efforts to have the band moved north. [13.]

13. From about 1925 until 1968, it appears that the Department simply took the view that the people on the Maple Creek Band were not Treaty Indians and refused on that basis to provide assistance. [14.] The basis for this new view by the Department appears to defy both historical fact and logic.

14. Between 1925 and 1944 little was done for the band. In that year the Superintendent of Indian Agencies, a Mr. Christianson and Sergeant Fleming of the Royal Canadian Mounted Police began efforts to acquire additional land for the band. [15.] Their efforts were however unsuccessful.

15. Beginning in 1955, Department officials and a local member of Parliament, Irvin Studer, again requested that additional lands be provided to the band. [16.] This resulted in the

addition of some lands by Order in Council passed on January 10, 1958. [17.]

16. In the 1960s, the Department again reviewed the history of the band and properly concluded that the Nikaneet Band were Treaty Indians. In 1968 band members began to receive annuity payments.

17. Given the Department's refusal to maintain pay lists since 1882, accurate estimates of the band's population throughout the period are difficult. It is clear however that from a high 428 persons in 1881, the population of the band declined. The Department's pay lists for 1882 showed a significant decline to 300 persons. In October, 1908, Inspector Graham reported to Frank Pedley that the band consisted of approximately 89 persons, 40 at Medicine Hat, 30 camped at Maple Creek and 19 more travelling. [18.] The population in October, 1914, was recorded as being 21 families totalling 81 persons. [19.] A population figure of 80 persons is referred to in April, 1915. [20.] By 1924 the population totalled approximately 60 persons, a number which appears to remain relatively constant until about 1944. [21.] By 1957 the band had increased to 78 persons with further increases by 1963 to a total membership of 101 individuals of which 83 were ordinarily resident on the reserve.

18. A review of correspondence found in the Archives (R.G. 10, Volume 779, File 27140, of the Headquarter's files, Department of Indian Affairs) confirms that annuity payments

were not made nor were farm implements or supplies provided as was required by Treaty No. 4.

19. Until the passage of the Order in Council creating the reserve in August, 1913, the band did not appear to receive any government assistance whatsoever after cessation of the annuity payments in 1882.

20. Since the establishment of the reserve in 1913, a permanent population has been maintained. The reserve itself is however of poor quality and unable to sustain the present band membership on an economic basis. A description of the original reserve lands is set out in correspondence sent by Sergeant Fleming to Superintendent Christianson and in Christianson's reports to the Department. Excerpts from that correspondence include the following comments:

> "All of Sections 24 and 25 and the NE of 26, all in Township 9, Range 24, W 3rd Meridian, this land is covered by scrub poplar approximately 25% and has practically no grazing land thereon, and no hay land whatsoever. It has one good spring in the southwest corner of the southwest quarter of Section 24, which is located in the southwest corner of the reservation proper. The land is on the north slope of the Cypress Bench, is extremely rough, and rocky, and even if cleared is not fit for agriculture. It is located between two portions of the east block of the Forestry Reserve - (Birch Creek Ranger Station) and is only suitable for growing bush."
>
> "This band has no cattle whatsoever, for different reasons, these being that they have no range for them, also no hay land on which to put up feed for them, also that the reservation is such that they could not live on it the year round, having to go out to work to obtain a living, therefore the stock could have practically no attention."
>
> "I do not know who picked it out but I do know if they had looked all over western Canada they could not have found poorer land for a reserve than these Indians have."

> "The whole reservation as it now stands would no more than keep the ordinary white family yet we have sixty Indians trying to eke out an existence on it." [22]

21. In 1957, Regional Supervisor Jones wrote to the Department in the following terms:

> "...It is physically impossible for this band of Indians, numbering 78, to even exist on their present reserve of 1,440 acres comprised for the most part of barren hills, rocks and coolies, which affords little more sustenance than is required to graze a mere handful of livestock."
>
> "...At the present time, this band of Indians have nothing except an above-average amount of intestinal fortitude." [23]

22. The fact that the band suffered extreme hardship in obtaining access to facilities off the reserve is also evident in this report where it is noted that it was not until 1955 that the children of band members were admitted to local schools.

23. To this day, the band faces enormous problems in attempting to maintain its members. There are few jobs on the reserve. The land itself continues to be incapable of supporting economic activity to an extent which can benefit more than a very few band members. The vast majority of band members seeking employment are forced to look off the reserve. The sitution can only improve if the band obtains land which can be used as a basis for farming, ranching or other enterprises.

II BAND'S POSITION

Under the terms of the Native Claims Policy Canada has recognized "outstanding business between Indians and government which for the sake of justice, equity and prosperity now must be settled without further delay." Included within the policy under the heading "Lawful Obligation" is the following:

> "The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e. an obligation derived from the law on the part of the federal government.
>
> Lawful obligation may arise in any of the following circumstances:
>
> (i) The non-fulfillment of a Treaty or agreement between Indians and the Crown.
>
> (ii) The breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder." (page 20)

It is the band's view that its claim may be supported under both of the foregoing heads.

In addition, since adoption of the Native Claims Policy, the Supreme Court of Canada in decision of Guerin v. Her Majesty the Queen has recognized that the Crown owes a fiduciary or trust obligation to Indians and Indian bands. It is the band's view that the circumstances of this case disclose a breach of that duty, be it categorized as a fiduciary duty or trust obligation towards the band and its members.

It should be beyond dispute that the band led by Frontman or Foremost Man was entitled to the benefits of Treaty No. 4. The Department acknowledged his and the band's status following the

signing of Treaty No. 4 by making annuity payments in 1881 and 1882.

The Department's conduct following that year cannot change the nature of its obligations. In fact, the reasons suggested by the Department over the years to justify its treatment of the band cannot be supported.

A further recognition of the band as a band entitled to benefits under both Treaty No. 4 and under the terms of the Indian Act is found in the establishment of the reserve by Order in Council in 1913. Having established the reserve it is difficult to understand the denial of further benefits to the band and its members.

The Department in the 1960s conducted a review of its records and has, since 1968, recognized the band as a separate band.

It is beyond question that the band was entitled to receive benefits due to a band under the Treaty and the Indian Act for the period from 1882 until payments were resumed in 1968.

On the basis of the facts outlined herein and other documentation within the Department's records, there would appear to be little question as to the validity of the band's claim and as to its right to receive compensation.

With respect to the band's claim based upon either breach of trust or breach of the Crown's fiduciary obligation, the Supreme Court of Canada in the Guerin decision has clearly held that in a legal sense the Crown may be held liable for damages should it breach the duty owed to the Indian people of Canada. In this

instance, whether the obligation be categorized as one of a fiduciary obligation or one of trust, the actions of the Crown towards the band and its members would clearly suggest a breach of the obligation.

The Crown initially recognized its duty towards the band by making Treaty payments. Subsequent recognition of the band's status can be found in the repeated attempts over periods in excess of forty years to have the band relocated. Finally, even after establishment of the reserve near Maple Creek, it appears that the Department treated the band and its members as if they were not Treaty Indians for a period in excess of forty years. The actions of the Department towards the band can best be summarized in the language adopted by Dixon, J. (as he then was) in the Guerin decision where he described the actions of the Crown towards the Musqueam Indian Band as being unconscionable in nature.

While the Guerin decision is one dealing with a surrender of lands, the reasoning applied in that case can, nonetheless, be applied to the Nikaneet Band's claim. Under Treaty No. 4, the band gave up its claim to large tracts of land in return for certain promises. It is clear from a review of the history of the band that the government (for reasons which suited itself) did not fulfill the terms of the Treaty.

Further, the scheme set forth in the Indian Act places the Crown in a pre-eminent position to control the lives of Indians, their reserves, their property and their commerce. While the precise nature of the obligation of the Crown under the Indian

Act might be debated, the total abdication of the Department's responsibility as in this case must result in the validation of the band's claim if the Native Claims Policy is to have any meaning at all.

III CONCLUSIONS

It is submitted that the claim of the Nikaneet Band No. 160A is clearly outlined in this submission and in material in the possession of the Department. The Department has been aware of the nature and extent of the band's claim for many years.

The band therefore asks that the Minister take steps to validate its claim as quickly as possible. Although the band believes that the value of its claim is substantial, it recognizes that some additional work will be required prior to presenting a full and detailed claim for compensation. The band would ask that upon validation of the claim, access be granted for funding to more accurately determine the extent of the compensation which should be negotiated.

The band and its solicitors, Messrs. Olive, Waller, Zinkhan & Waller, are prepared to meet you and your officials at your convenience and to assist in any further research which may be required in order to validate the claim. An early response in this regard would be appreciated.

All of which is respectfully submitted on behalf of the band this ____ day of February, A.D. 1987.

NIKANEET BAND NO. 160A

Per: _____
Chief Gordon Oakes

Per: _____
John Oakes, Councillor

Per: _____
Larry Oakes, Councillor

V FOOTNOTE REFERENCES

1. Treaty No. 4, dated September 15, 1874, approved November 4, 1976, P.C. No. 1322; IAND Publication No. -OS-0572-000-EE-A-1.

2. Ibed, See also Memorandum signed by A. MacKenzie seeking Privy Council approval of the Treaty; IAND Publication No. -OS-0572-000-EE-A-1.

3. Departmental Annuity Pay Lists for 1881 and 1882 recording payments made at Fort Walsh entitled "Foremost Man Band" and "Front Man's Band."

4. R.G. 10, Vol. 3652, Files 8589-1 & 2, Vol. 3691, File 13893.

5. Ottawa, Public Archives, Record Group 20, Indian Affairs Telex, Vol. 3757, File 31,333, letter Allen to Asst. Commissioner Galt, Mar. 31, 1881; File 31397, letter Allen to Dewdney, July 5, 1881, letter Dewdney to Superintendent. General of Indian Affairs, August 18, 1883, letter - Inspector Wadsworth to Dewdney August 14, 1884, letter - Col. Irvin to Comm., August 27, 1884.

6. R.G. 10, Box 390, 858, File 27140 Dewdney to Superintendent General, February 15, 1886.

7. R.G. 10, Vol. 7779, File 27410, W. G. Graham, Inspector of Indian Agencies to F. Pedley, Deputy Superintendent General, Indian Affairs, October 3, 1908.

8. See, for example, footnote 9, supra, letters from George Gunn to J. A. MacDonald, February 21, 1887, letter from J. J. English, local rancher, to J. F. Sanderson dated May 18, 1897; Petition of J. F. Sanderson to the Minister dated May 25, 1897. Other correspondence in R.G. 10, Vo.. 7779, File 27410.

9. Petition of February 1896 signed by local residents and presented to the Minister.

10. R.G. 10, Box 390, 850, File 27140, Commissioner Laird to the Sec. Deputy of Indian Affairs, May 3, 1906.

11. Ibid, Campbell to Deputy Superintendent General, May 10, 1906.

12. F. Pedley, Deputy Superintendent General to W. M. Graham, Inspector of Indian Agencies, May 7. 1908.

13. Order in Council dated August 2, 1913.

14. The source of this view appears to have begun with a letter from Agent Murison to Commissioner Graham dated January 12, 1925.

15. Christianson to Indian Affairs, June 16 and August 3, 1944; Sgt. Fleming to Christianson, July 14, 1944.

16. See , for example, letter from Regional Supervisor to Indian Affairs, Ottawa dated September 19, 1955; letter from Supervisor Jones to Indian Affairs, Ottawa, January 31, 1957.

17. Order in Council, January 10, 1958.

18. R.G. 10, Vol. 7779, File 27140, Headquarters File, letter, Inspector W. M. Graham to Frank Pedley, Deputy Superintendent General Indian Affairs, October 3, 1908.

19. Ibed, letter from "Stoney Indian" to Department of Indian Affairs, Ottawa dated October 23, 1914.

20. Ibed, letter from P.M.O. Turner, Medicine Hat, to Department of Indian Affairs, Ottawa, August 5, 1915.

21. Ibid, letter, N. McTaggart, M.P., Gull Lake, Sask. to Department of Indian Affairs, August 4, 1924.

22. Ibid, Sgt. Fleming, Maple Creek R.C.M.P. to Superintendent Christianson, Regina, July 14, 1944.

23. Ibid, E. S. Jones, Reg. Supervisor Indian Agencies to Indian Affairs Branch, Ottawa, January 31, 1957.

24. Ibid, E. S. Jones, Reg. Supervisor Indian Agencies to Indian Affairs Branch, Ottawa, January 31, 1957.

APPENDIX B

GOVERNMENT OF CANADA'S OFFER TO ACCEPT CLAIM

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Assistant Deputy Minister
Sous-ministre adjoint

Ottawa, Canada
K1A 0H4

OCT 2 3 1998

WITHOUT PREJUDICE

Chief Larry Oakes
Nekaneet First Nation
P.O. Box 548
MAPLE CREEK SK S0N 1N0

Dear Chief Oakes:

On behalf of the Government of Canada and in accordance with the Specific Claims Policy (SCP), I offer to accept the Nekaneet First Nation's (NFN) agricultural and ammunition and twine benefits claim under Treaty No. 4 for negotiation of a settlement, as set out below.

For the purpose of negotiations and within the meaning of the SCP, Canada accepts that the NFN has sufficiently established that Canada has a lawful obligation with respect to the provision of agricultural benefits and ammunition and twine under Treaty No. 4.

The settlement of this claim will be done in accordance with Canada's SCP, as outlined in the book *Outstanding Business*. Any offer of compensation will be guided by the compensation criteria outlined in *Outstanding Business* as follows:

1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. This compensation will be based on legal principles; and

.../2

Canada

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2) Any compensation paid in respect to a claim shall take into account any previous expenditure already paid to the claimant in respect of the same claim.

The NFN claim is the first agricultural benefits claim Canada has accepted under Treaty No. 4, and is the first historical claim for agricultural benefits accepted by Canada. In order to better prepare for negotiation, Canada must conduct further work on compensation requirements. We regret this further delay, but hope to be in a position to initiate the negotiation process early next year.

The steps in the negotiation process which will be followed include: negotiations toward a settlement agreement; drafting of a settlement agreement; concluding the agreement; ratifying the agreement; and finally, implementation of the agreement.

Throughout the claims process, Canada's files, including all documents submitted to Canada concerning the claim, are subject to Access to Information and Privacy legislation in effect.

All negotiations are conducted on a "without prejudice" basis. Canada and the NFN acknowledge that all communications, whether oral, written, formal or informal, are made with the intention of encouraging settlement of the dispute between the parties only, and are not intended to constitute admissions by any party.

The acceptance of the claim for negotiations is not to be interpreted as an admission of liability or fact by Canada. In the event that settlement cannot be reached and litigation ensues, Canada reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence.

In the event that a final settlement is reached, the settlement agreement must contain a release from your First Nation ensuring that this claim cannot be reopened. As part of the settlement, Canada will also require an indemnity from your First Nation.

.../3

If you have any questions or concerns which you wish to raise prior to the initiation of negotiations, please contact Anne-Marie Robinson, Director, Policy and Research at (819) 953-1987.

Yours sincerely,

Warren Johnson
A/Assistant Deputy Minister
Claims and Indian Government

c.c.: Thomas Waller
Jake Tootoosis
Bill Bernhardt
Audrey Stewart